

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-2056 B
75-2056

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-2056

UNITED STATES ex rel. ALTON CANNON,

Appellee,

-against-

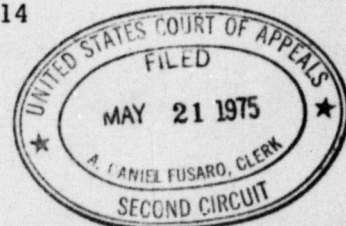
HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Appellant.

Appeal from the United States District
Court for the Western District of New York

APPELLANT'S APPENDIX

JACK B. LAZARUS
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iv-1970-535 US ex rel. Alton Cannon v. Vincent R. Mancusi, Warden, Attica etc.

DATE	PROCEEDINGS	Date Order of Judgment Noted
1970		
Nov. 23.	Filed Petition	
23.	" Decision & Order allowing filing in forma pauperis and denying application-Henderson, J (Notice & copy to Messrs. Cannon & Lefkowitz)	F-110
23	JS 5 made	
74 23	JS 6 made	
an. 6	Filed Petition	
an. 6	Filed Decision & Order that respondent show cause why petitioner's application should not be granted and directing respondent to submit certain documents & answer in response to petitioner's contentions on or before 2/15/71-Henderson, J (notice & copy to petitioner & Mr. Lefkowitz, Bflo.)	F-112
6	JS 5 made	
Feb. 10	Filed Deft's. Answer	
1972		
June 13.	" Decision and Order denying writ, denying certificate of probable cause and denying appeal in forma pauperis but allowing filing notice of appeal without payment-Henderson, J. (notice & copy to petitioner and Mr. Lefkowitz, Bflo.)	F-12
13	JS 6 made	
19	Filed Petitioner's Notice of Appeal (copy mailed to Mr. Lefkowitz, Bflo. and to Clerk, CCA with copy of docket entries)	
1973		
Mar. 15	File sent to U.S. Court of Appeals	
Apr. 25	File returned from CCA	
25.	Filed copy of order of CCA granting petitioner's motion for certificate of probable cause, etc.	
May 7	Original papers, exhibits, docket entries and Clerk's certificate mailed to Clerk, CCA	
Nov. 27	Filed certified copy of order from the CCA that the actions of said District Court be and they hereby are remanded to said Dist. Court for further proceedings consistent with the opinion of this Court.	
27	JS 5 made	
Dec. 3	Filed order that a Wade hearing be held & that William H. Gardner be appointed counsel & Frederick A. Provorny as co-counsel. All parties concerned shall inform the Ct. on or before 12-17-73 of the earliest date which they may be prepared for hearing-Henderson, DJ Petr. Wm. Gardner, Frederick Provorny & Louis Lefkowitz.	F-147
3	Filed CJA-20 copy 5 appointing Wm. H. Gardner & Frederick A. Provorny as counsel cy. 4 mailed to Adm. Office	
1974		
Mar. 26	Filed Pltfs. notice of motion for an order directing Respondent Monroe Cty. Dist. Attys. Office & Roch. Police Dept. to produce documents ret. 4-1-74.	
Apr. 1	Ct. will prepare order, materials to be forwarded to Clerk where Pet's. atty. will examine.	
12	Filed order that this matter is to be processed in this Ct. & respondents are to produce certain documents & that they are to be held by the Clerk for examination-Curtin, DJ Notice & copies to Messrs. Gardner, Provorny, Lefkowitz & Monroe Cty. DA	F-151
June 7	Filed Pltfs. notice of motion for an order prohibiting respondent from introducing into evidence any further proceedings etc. ret. 6-17-74	

CLOSED

US ex rel. Alton Cannon v. Vincent R. Mancusi, Warden Attica, etc.

C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order Judgment No
1974		
June 14	Filed order that respondent is prohibited from introducing into evidence in any further proceedings any documents or other material referred to in the order dated 4-12-74 or testimony of any witness & setting a final hearing adj to 7-1-74-Curtin, DJ Notice & copies to Wm. Gardner, Frederick A. Provorny, Louis J. Lefkowitz, & Melvin Bressler	F-153
17	Order signed, adj. to 7-1-74.	
July 1	Hearing set for 7/12/74 - telephone and mail notice sent and orig. papers to be ret'd. from CCA	
12	Filed Civil Subpoena-served 7/12/74 on Wm. Mahoney of Monroe Co. Sheriff's Office	
12	Hearing begins. Hearing Concluded to submit briefs by 8-5-74. by counsel.	
Aug. 1	Filed Ct. Steno. transcript of proceedings held 7-12-74	
2	Filed copy 5 CJA 21 authorizing production of transcript of Wade Hearing copy 4 mailed to Adm. office.	
2	" copy 2 CJA authorizing payment in the amt. of \$45.00; copy 1 mailed to Adm. office.	
5	Return date for briefs, adj. to 8-12-74 adj. 8-26-74/	
6	Original papers and exhibits returned from CCA	
Dec. 20	Filed affidavit of Melvin Bressler dated 6-28-74.	
1975		
Feb. 20	Filed order that petr. Alton Cannon, is granted a writ of habeas corpus releasing him from custody unless the respondent commences proceedings within 30 days to afford the petr. a new trial-Curtin, DJ Notice & copies to William H. Gardner, Frederick A. Provorny and Louis J. Lefkowitz	F-161
20	Filed judgment that petr. is granted a writ of habeas corpus releasing him from custody etc.-Clerk Notice & copies to William H. Gardner, Frederick A. Provorny & Louis J. Lefkowitz	F-161
20	JS 6 made	
March 18	Filed Respondent's Notice of Appeal (copy mailed to Mr. Gardner and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Lefkowitz, Bflo.)	
Apr. 1	Filed order to show cause why an order should not issue for enlargement of the petr. upon his own recognizance etc. ret. 4-7-75-Curtin, DJ	F-163
7	Filed order for enlargement of petr. on his own recognizance & for leave to proceed on appeal in forma pauperis etc.-Curtin, DJ Notice & copies to Wm. Gardner, Frederick Provorny & Louis J. Lefkowitz	F-163
11	Filed Pltfs. affidavit of personal service of Order for Enlargement of Petitioner on Attica Correctional Facility on 4-7-75.	
7	Ret. of order to show cause. Consent order to be submitted.	
18	Original papers, exhibits, docket entries and Clerk's certificate mailed to Clerk, CCA	

CLOSED *any-on* A-2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
ALTON CANNON,

Petitioner

-vs-

Civil 1970-535

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,
Attica, New York,

Respondent

APPEARANCES: WILLIAM H. GARDNER, ESQ., Buffalo, New York
and
FREDERICK A. PROVORNY, ESQ., New York,
New York,
for Petitioner.

LOUIS J. LEFKOWITZ, ESQ., Attorney General,
State of New York (BEDROS ODIAN, ESQ., of
Counsel), Buffalo, New York,
for Respondent.

This matter was initially before the late Chief
Judge John O. Henderson. Petitioner submitted a pro se
application for a writ of habeas corpus, alleging that
his 1969 conviction for first degree rape in Monroe
County Court was unconstitutionally obtained. In 1972
Judge Henderson denied the petitioner's application,
without a hearing, on the merits. After timely notice

was filed, an appeal was taken to the Second Circuit Court of Appeals.

In a decision and order of the Circuit Court, the matter was remanded for further proceedings. United States ex rel. Cannon v. Montanye, 486 F.2d 263 (2d Cir. 1973), cert. denied, 416 U.S. 962 (1974). The panel held, pursuant to 28 U.S.C. §2254(d)(3), that the record of the state court proceedings lacked development of essential material facts regarding the in-court identifications of the petitioner. 486 F.2d at 268. The district court was directed to conduct or supervise an evidentiary hearing on the issues of unnecessary suggestiveness of the lineup and the likelihood of misidentification. 486 F.2d at 268.

The appellate tribunal was particularly concerned by the victim's inability to observe the rapist at the time of the attack, save for a glimpse of a green shirt. At the lineup, four days after the offense was committed, Cannon was wearing a green shirt and was selected by the victim. The testimony in the state court proceedings, however, failed to reveal details of how

the other men in the array were clothed.¹ Furthermore, Cannon had been directed to wear a green shirt when he was arrested in his hotel room on the day of the lineup. The possible constitutional infirmity of the procedure was characterized by Judge Feinberg as follows:

If all were dressed in green, the inference of undue suggestion would clearly fail. If one or two had on green shirts, the inference would weaken very considerably. . . . if the inference remained, it would acquire great importance . . . where the victim's "opportunity . . . to view the criminal at the time of the crime" was limited,
486 P.2d at 268.

On December 3, 1973 Judge John O. Henderson appointed William H. Gardner, Esq. to represent the petitioner and Frederick A. Provorny, Esq., the petitioner's appellate lawyer, was appointed co-counsel. Shortly thereafter, following Judge Henderson's decease, the matter came before me. At that point counsel for the petitioner commenced discovery proceedings to obtain matter deemed essential to prepare for the hearing. The bulk of the material sought, however, was either unavailable or not produced. After discovery reached an impasse,

a hearing was scheduled and held in this court on July 12, 1974.

FINDINGS OF FACT

The only witness called by either party was William Mahoney, Chief of Detectives for the Monroe County Sheriff's Department in Rochester, New York. On September 5, 1968 Mahoney conducted the lineup in his capacity as a supervisor for the Rochester Police Department's Detective Bureau. Mahoney conducted numerous lineups during this period for the police department. Although he stated that he had reviewed his trial testimony, Mahoney claimed to have a vivid independent recollection of the 1968 lineup because of prior contacts he had had with Cannon.

According to Mahoney, Lieutenant George Reiss and Detective Daniel Funk were assisting him, and the complainant was present. In keeping with the practice then, the names and positions of the persons in the array were recorded, but no photographs were taken or descriptions noted. In response to questions from the State Attorney General, Mahoney testified as follows:

Q. They were all in civilian clothing?

A. That is correct.

Q. Does that include Alton Cannon?

A. Yes, sir.

Q. All five people in the lineup had civilian clothing?

A. Yes, sir.

Q. Were the heights of the five individuals varying?

A. It would probably be easier, sir, if I explained that the persons in the lineup involved the selection of four other persons who were selected for race, height and weight similar to that of the subject, Alton Cannon. I would say that everybody in the lineup was within the same age group, early twenties, they were within an inch or so above or below the height of Alton Cannon, they were also within I would say approximately ten pounds of the individual, Alton Cannon, and they were selected from approximately forty or fifty people, young males, that were in the jail at the time. Also one of the four individuals selected for the lineup was wearing a green sweater similar, in fact, almost identical, to the one that Alton Cannon wore.

Federal hearing Tr. at 10, 11.

The only other significant direct testimony advanced by Mahoney concerned the manner in which the

victim identified Cannon:

THE COURT: Tell us what the lady said, please.

THE WITNESS: I went back to the other side of the lineup to ask her if she could identify anybody in that lineup. She said, "Number 5." I said, "How do you know?" She said, "I can recognize him by his face." She said, "I would also like to see a profile of him." I returned to the other room on the other side of the mirror and I had Cannon step forward. He showed her the right side of his face, the profile, and I returned him to the lineup, and went back and again spoke to Mrs. Ripple and asked her if she was sure of the same man. She said exactly, positively it was him.

Tr. at 12.

Cross-examination considerably weakened Mahoney's testimony. Although he steadfastly maintained that the green shirts worn by Cannon and one of the other men in the lineup were identical, he was short on specifics. Mahoney could not recall if the shirts had long or short sleeves, were cardigan or pullover, dull or shiny, thick or thin, crew neck or button down, were worn inside or

outside the trousers, or even if they were light or dark green.² In addition, Mahoney's reportedly "vivid" recollection of the lineup was considerably clouded when he failed to establish which fellow officers were in fact present at the time. It was also apparent that Mahoney's "standard" lineup practices were a source of some of his detail, albeit unconsciously, considering the passage of six years since the event.³

At the conclusion of Mahoney's testimony the hearing came to an abrupt end. Neither the victim nor the other officers present at the lineup were called by the state to testify. Furthermore, the state did not indicate that these other witnesses were unavailable.

CONCLUSIONS OF LAW

On the basis of the testimony adduced at the hearing, the inference of damaging suggestibility at the petitioner's lineup was not dispelled. Detective Mahoney's testimony can only be characterized as equivocal. But, an additional factor to be weighed against the state is the failure to produce critical witnesses

to the events on the day of the lineup. The availability of the victim and the other officers in attendance at the lineup was not disputed. Under some circumstances, the state alone might not bear a burden for failing to produce them at the hearing. 2 WIGMORE ON EVIDENCE, §288 (3d Ed. 1940); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Llamas, 280 F.2d 392 (2d Cir. 1960).

Here, however, members of the investigative team were not called although they testified in the state trial concerning the precise matters sought to be developed with greater particularity in this hearing. Even the victim, the person whose testimony and identification contributed more to Cannon's conviction than anything else, was not called. Under these circumstances, I sense that the state's failure to call these witnesses, particularly the victim, when they have sided with the state in the past, indicates that their testimony would have been unfavorable to the state. United States v. Johnson, 467 F.2d 804, at 809 (1st Cir. 1972), cert. denied, 93 S.Ct. 963 (1973); see also United States

v. Cotter, 60 F.2d 689 (2d Cir. 1932).

What emerges from a synthesis of the record in the state court and the hearing before me is a conclusion that the lineup was impermissibly suggestive. Cannon was directed by the arresting officer to wear a distinctive green shirt because that was an important lead in the investigation. But none of the other lineup participants was asked to wear that particular shirt and at least three or four, if not all of the other men in the lineup, were not wearing shirts anything like Cannon's. See Foster v. California, 394 U.S. 440 (1969).

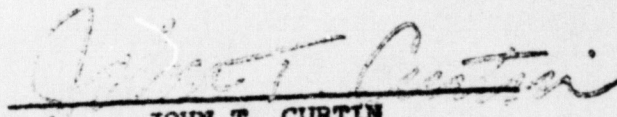
At the time of the attack, the victim was unable to see the perpetrator's face. Her initial description to police officers was almost valueless.⁴ In addition, the victim had been drinking just prior to the attack. Furthermore, the lineup in question did not occur until almost five days had passed. Under these circumstances, I am forced to conclude that the possibility of irreparable misidentification was so great that it was error to admit any testimony with regard to identification at all. Neil v. Biggers, 409 U.S. 188 (1972); Simmons

v. United States, 390 U.S. 377 (1968); United States
ex rel. Bates v. Mancusi, 360 F.Supp. 1340 (W.D.N.Y.
1973).

Finally, the admission of this identification testimony must be declared constitutionally harmful, Chapman v. California, 396 U.S. 18 (1967), because there was almost no other conclusive evidence introduced at the trial. This becomes more significant when corroboration requirements in effect at the time of the offense are considered.

Therefore, it is hereby ordered that the petitioner, Alton Cannon, is granted a writ of habeas corpus releasing him from custody unless the respondent commences proceedings within thirty days to afford the petitioner a new trial.

So ordered.


JOHN T. CURTIN
United States District Judge

DATED: February 20, 1975

FOOTNOTES

- 1 ". . . one or two approximately the same in dress." Record on Appeal [hereinafter Record] at 111.
- 2 This is not surprising since Lieutenant George Reiss, the arresting officer, first explored the green shirt connection and directed Cannon to wear the shirt to police headquarters. Record at 216.
- 3 Mahoney's insistence that the victim identified Cannon's face is the best example of this phenomenon. At the initial Wade hearing and trial Mahoney never revealed this fact. Furthermore, the victim's testimony clearly establishes that she never saw her assailant's face.
- 4 ". . . he had a green shirt on, dark pants and black shoes. He was a male negro. He was on the thin side." Record at 182.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES ex rel. ALTON CANNON,
Petitioner,

-vs-

Civil 1970-535

VINCENT MANCUSI,
Respondent.

Proceedings in the above entitled action held before
the HON. JOHN T. CURTIN, United States District Judge, in
and for the Western District of New York, at Buffalo,
New York, on July 12, 1974.

APPEARANCES: WILLIAM H. GARDNER, ESQ., and
 FREDERICK PROVORNY, ESQ.,
 Appearing on behalf of Petitioner.

 BEDROS ODIAN, ESQ.,
 Assistant Attorney General,
 State of New York,
 Appearing on behalf of Respondent.

* * * * *

INDEX TO WITNESSES

	DR.	CR.	RED.	REC.
WILLIAM MAHONEY	3	13	--	--

INDEX TO EXHIBITS

PETITIONER'S EXHIBITS

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P-1 Transcript	25	

* * * * *

1 THE COURT: In the matter of the United States ex rel
2 Alton Cannon, Civil 70-535.
3 MR. ODIAN: Yes, your Honor. Mr. Gardner is outside,
4 may I bring him in?
5 THE COURT: Is Mr. Gardner here?
6 MR. ODIAN: Yes, he is, your Honor.
7 THE COURT: Mr. Gardner and Mr. Odian, who are the
8 other attorneys?
9 MR. GARDNER: Frederick Provorny is co-counsel.
10 THE COURT: What is his name?
11 MR. GARDNER: P-r-o-v-o-r-n-y, a former law clerk to
12 Judge Medina of the Second Circuit. He
13 was the assigned counsel on the earlier
14 appeal in this case and is co-counsel on
15 this hearing.
16 THE COURT: Are we ready for a hearing?
17 MR. GARDNER: Your Honor, we are ready for a hearing. We
18 have had some discussion in the hallway, and
19 I understand your Honor thought it would not
20 be necessary to have the prisoner present,
21 and that gives us some procedural questions
22 but I think they can be resolved. So that
23 I think we can go forward with the hearing
24 and put the case in a posture where you can
25 make a decision on the directed verdict,

1 which we propose to make, reserving the
2 rights of the prisoner to take the stand,
3 if he wishes. It is our expectation and
4 intent that he will not take the stand, so
5 I don't think his absence will be a problem.

6 THE COURT:

In this case we had the order which directed
7 the district attorney to deliver to you
8 certain materials and, as I understand it,
9 he did not, and then on June 14th -- later
10 than that -- didn't I sign an order?

11 MR. GARDNER:

12 There was a preclusion order, your Honor,
13 which required that the materials be
14 provided no later than ten o'clock on
15 Monday, July 2nd, I believe it was-- July
16 1st, excuse me -- failing which they would
17 be precluded. Now, what has happened is
18 that apparently Mr. Bresler, the assistant
19 district attorney in Monroe County, prepared
20 an affidavit on the preceding Friday, the
21 28th, but instead of putting it in the mail
22 to be sure it would be mailed, he put it
23 in the out box, and it apparently did not
24 get mailed until some time Monday. I
25 received it Tuesday, after the last appearance before your Honor. Now, as to the

1 question of timeliness of the service of
2 the affidavit, we will not question that.
3 We think, as to the production of any
4 documents, however, although there are
5 some documents referred to in the affidavit,
6 we will take the position that they and
7 any evidence based upon them are precluded
8 because we never received copies of them.

9 THE COURT: Was that affidavit --

10 MR. GARDNER: That was not filed. I have a duplicate
11 signed copy. Do you have the original,
12 Mr. Odian?

13 MR. ODIAN: At least I have a copy.

14 THE COURT: Now, as I understand it, Mr. Gardner, in
15 any event, it will be necessary to have
16 some witnesses?

17 MR. GARDNER: There is one witness the People are pro-
18 ducing, your Honor. I don't believe it
19 will be a long witness.

20 MR. ODIAN: I don't plan it to be a long one, on our
21 behalf. It is Detective Mahoney, your
22 Honor.

23 THE COURT: The obligation is on the People to bring
24 the witnesses.

25 MR. GARDNER: That is correct.

1 MR. ODIAN: Well --

2 THE COURT: So he is the witness?

3 MR. ODIAN: He is our witness. He is here in the
4 courtroom.

5 THE COURT: Very well. I will have to take some argu-
6 ment and determine what course to take
7 in this other matter, and then we will
8 have the hearing in a short time.

9 MR. GARDNER: All right. We will be in the hallway,
10 your Honor.
11

12 * * * * *

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1 PROCEEDINGS RESUMED PURSUANT TO RECESS.

2
3 THE COURT: Now, in the case of United States ex rel
4 Alton Cannon, Civil 70-535, are you ready
5 Mr. Odian?

6 MR. ODIAN: Yes, we are, your Honor.

7 MR. GARDNER: Your Honor, we are ready, but I just wanted
8 to say a little more about what I suggested
9 before. I was suprised that the prisoner
10 wasn't here today. I don't think it makes
11 any difference, and I will get the prisoner's
12 consent.

13 THE COURT: You see, especially in a situation that
14 involves identification.

15 MR. GARDNER: I agree, as a practical matter it makes no
16 difference at all.

17 THE COURT: Usually the lawyers say that it is to our
18 advantage in an identification hearing not
19 to have their defendants present in court.

20 MR. GARDNER: Your Honor, I am not objecting at all, I
21 merely want to protect the record. I've
22 got to talk to my client because he is an
23 assigned client. I will procure his consent
24 to correct any technical question that may
25 exist.

1 MR. ODIAN: Your Honor, with the Court's permission, I
2 would like to call Mr. William Mahoney as
3 our witness in this case.
4

5 W I L L I A M M A H O N E Y , called as a witness on
6 behalf of the Respondent, and being first duly sworn,
7 testified as follows:
8

9 DIRECT EXAMINATION BY MR. ODIAN:

10 Q. Mr. Mahoney, do you hear me well from here?

11 A. Yes, I do.

12 Q. I am going to ask you, Mr. Mahoney, where are you
13 presently employed?

14 A. Monroe County Sheriff's Department, Rochester, New
15 York.

16 Q. What is your occupation there?

17 A. Chief of Detectives.

18 Q. I am going to refer you back, Mr. Mahoney, to the
19 date September 5, 1968, at that time where were you
20 employed?

21 A. The Rochester Police Department.

22 Q. What was your capacity in the police department at
23 that time?

24 A. I was a detective supervisor attached to the Physical
25 Crimes Unit, Detective Bureau.

- 1 Q. The name Alton Cannon, is that familiar to you?
- 2 A. Yes, sir, it is.
- 3 Q. Were you in any way connected with a lineup relating
- 4 to Alton Cannon?
- 5 A. Yes, I was in charge of it.
- 6 Q. And Alton Cannon was a defendant in a criminal case,
- 7 is that correct?
- 8 A. Yes, sir.
- 9 Q. Okay. At this lineup you say you were present, who
- 10 was in charge of the lineup?
- 11 A. I was, sir.
- 12 Q. Okay. Was there anybody else at that lineup -- I
- 13 don't mean the suspects, and so forth, I mean on
- 14 behalf of the police department -- was there anyone
- 15 else there?
- 16 A. Yes, sir, the complainant, Shirley Ripple, and Lt.
- 17 George Reiss, and Detective Dan Funk.
- 18 Q. And the complainant, Mrs. Ripple?
- 19 A. That is right.
- 20 Q. How many people were in the lineup?
- 21 A. Five.
- 22 Q. Five persons?
- 23 A. Five males.
- 24 Q. What was their race?
- 25 A. They were all black.

1 Q. They were all black?

2 A. Yes, sir.

3 Q. Among the individuals in the lineup were there any
4 police officers posing as suspects?

5 A. No, sir, there were not.

6 Q. What place did you obtain these five persons in the
7 lineup?

8 A. From the jail downstairs, of people who had been
9 arrested but had not yet been arraigned, they had
10 civilian clothing.

11 Q. They were all in civilian clothing?

12 A. That is correct.

13 Q. Does that include Alton Cannon?

14 A. Yes, sir.

15 Q. All five people in the lineup had civilian clothing?

16 A. Yes, sir.

17 Q. Were the heights of the five individuals varying?

18 A. It would probably be easier, sir, if I explained that
19 the persons in the lineup involved the selection of
20 four other persons who were selected for race, height
21 and weight similar to that of the subject, Alton Cannon.
22 I would say that everybody in the lineup was within
23 the same age group, early twenties, they were within
24 an inch or so above or below the height of Alton Cannon.
25

1 they were also within I would say approximately ten
2 pounds of the individual, Alton Cannon, and they were
3 selected from approximately forty or fifty people,
4 young males, that were in the jail at the time. Also
5 one of the four individuals selected for the lineup
6 was wearing a green sweater similar, in fact, almost
7 identical, to the one that Alton Cannon wore.

8 Q. Do you recall what the other individuals in the lineup
9 were wearing?

10 A. Yes, sir, they all had a sweater or a jacket that they
11 were wearing.

12 Q. Among the five in the entire lineup, were any individual
13 wearing outer garments, outside of the sweaters?

14 A. One was wearing a jacket. It would be similar to a
15 sweater, short, to the waist.

16 Q. Can you recall, Mr. Mahoney, as you look at the lineup,
17 left to right, what position Mr. Cannon was standing
18 in?

19 A. He was in position 5, at the end of the line.

20 Q. Extreme right as you look?

21 A. As you look at him, left to right, he would be to the
22 extreme right.

23 Q. Now, coming to the complainant, the victim, can you
24 please tell the Court how she identified whoever she
25 identified?

1 A. She identified Alton Cannon by his features, his face.

2 MR. GARDNER: Objection. Unless the complainant said
3 that, that is a conclusion that the witness
4 has drawn.

5 THE COURT: Tell us what the lady said, please.

6 THE WITNESS: I went back to the other side of the lineup
7 to ask her if she could identify anybody
8 in that lineup. She said, "Number 5." I
9 said, "How do you know?" She said, "I can
10 recognize him by his face." She said, "I
11 would also like to see a profile of him."
12 I returned to the other room on the other
13 side of the mirror and I had Cannon step
14 forward. He showed her the right side of
15 his face, the profile, and I returned him
16 to the lineup, and went back and again spoke
17 to Mrs. Ripple and asked her if she was
18 sure of the same man. She said exactly,
19 positively it was him.

20
21 BY MR. ODIAN:

22 Q. You made a remark 'approximately the other side of
23 the lineup,' I don't understand that.

24 A. The lineup is a room with a mirror on the wall. The
25 five subjects face the mirror. In order to talk to

1 the witness, who was looking through the one way mirror
2 at the subjects, you have to go out into the hall, into
3 another room -- another doorway. The rooms are back to
4 back.

5 MR. ODIAN: We have no further direct examination, with
6 the right to come back, your Honor. Thank
7 you.

8
9 CROSS EXAMINATION BY MR. GARDNER:

10 Q. Mr. Mahoney, what is your title now?

11 A. Chief of Detectives.

12 Q. That is the sheriff's office?

13 A. That is correct.

14 Q. How long have you been with the sheriff's office?

15 A. Since January 20th.

16 Q. Of this year?

17 A. Yes, sir.

18 Q. Did you bring any of your files from the police depart-
19 ment with you when you took on your new employment?

20 A. No, sir.

21 Q. Have you had a chance to look at any records in
22 connection with this Cannon case in preparation for
23 today's hearing?

24 A. Only a record that the district attorney had of the
25 case.

1 Q. And can you describe what that record was?

2 A. I believe it was a transcript.

3 Q. A transcript of prior testimony?

4 A. Yes, sir.

5 Q. You have not had a chance to look at any notes or
6 records from your files at the police department or
7 anything of that sort?

8 A. There is no file with notes, sir.

9 Q. Now, would you say that your reading of the transcript
10 refreshed your recollection as to what happened at the
11 time of this lineup?

12 A. No, sir.

13 Q. You recalled it perfectly clearly without reading the
14 transcript?

15 A. The only thing I would say, that the -- there was a --
16 the names of the five subjects and their position in
17 the lineup, which was in the district attorney's file.

18 Q. Now, actually, this lineup occurred in 1968, is that
19 correct?

20 A. Yes.

21 Q. Six years ago from now?

22 A. Yes, sir.

23 Q. And yet you can recall in detail the handling of this
24 lineup at this time, and without having to refer to
25 the transcript to help you, is that right?

1 A. That is correct.

2 Q. Were you frequently engaged in arranging lineups for
3 the prisoners at the Rochester Police Department?

4 A. I have done quite a few.

5 Q. And would you say you have a clear recollection of
6 all of those lineups you prepared?

7 A. I would say in certain cases, yes, sir.

8 Q. In certain cases, I gather not all?

9 A. I would probably say I would remember anything that
10 stood out. Some lineups are easier to prepare than
11 others.

12 Q. Why does this lineup stand out in your recollection?

13 A. Well, I worked on the case a while, and this subject
14 in particular, Cannon, I'm familiar with him. I recall
15 the case very vividly.

16 Q. On the morning in question, Chief, do you recall that
17 you had first seen Mr. Cannon at approximately eight-
18 thirty in the morning, and this lineup was arranged
19 around nine o'clock or thereabouts?

20 A. That is correct.

21 Q. And from your testimony I gather that the other persons
22 placed in the lineup were persons who happened to be
23 on the premises, prisoners who were in the process of
24 being processed?

25 A. That is correct.

1 Q. And did some officers, who were assisting you, working
2 under your supervision, arrange to pick those people
3 out and bring them upstairs?

4 A. Yes, Detective Funk and Lt. Reiss.

5 Q. Now, when Detective Funk and Lt. Reiss brought these
6 people upstairs, did they put them directly in the
7 subject room, the lineup room?

8 A. Yes. I brought them upstairs.

9 Q. You brought them upstairs?

10 A. Yes, sir.

11 Q. Had they already been selected when you went down?

12 A. I selected them.

13 Q. You selected them yourself?

14 A. Yes, sir.

15 Q. Now, with regard to the selection, did you find out
16 of forty to fifty people present on the premises
17 individuals with green clothing on, in the nature of
18 sweaters or shirts of some sort?

19 A. I found one, sir.

20 Q. Only one?

21 A. Yes, sir.

22 Q. Did you make an effort to find any green garments for
23 the others to wear so that there would be a similarity
24 of clothing?

25 A. We had no supplies, sir.

1 Q. So that your answer is that you made no effort to
2 obtain similar garments from some other source before
3 holding the lineup?

4 A. I would have, but there was no place I could go.

5 Q. With regard to the two individuals who had a green
6 article of clothing on, one was Mr. Cannon, can you
7 describe that article of clothing?

8 A. It was like a cardigan sweater, shirt-type sweater.

9 Q. A shirt-type sweater?

10 A. Yes.

11 Q. What type of fabric was it, as you could observe it?

12 A. I couldn't say. I don't know if it was a knit or
13 cotton or what.

14 Q. Could you tell us -- without regard to whether it
15 was knit or cotton, could you tell us whether it was
16 fuzzy, rough or shiny with a sheen on it, anything
17 of that sort?

18 A. I couldn't say.

19 Q. Are you acquainted with so-called banlon shirts or
20 sweaters?

21 A. Yes, it was of a banlon nature.

22 Q. How would you define a banlon type of garment?

23 A. They have short sleeves sometimes, and it's a crew
24 neck type sweater.

25 Q. It is a relatively light garment, as opposed to a

1 heavy sweater?

2 A. It is not considered an outer garment.

3 Q. Would you compare it in size or weight to a T shirt,
4 with more style or appearance to it, perhaps?

5 A. I would say so.

6 Q. You said that -- first of all, this shirt or whatever
7 Mr. Cannon had on, did it have long sleeves or short
8 sleeves?

9 A. I don't remember exactly. It seems to me it was short.
10 I couldn't say for sure.

11 Q. It was a cardigan, you mean it opened down the front,
12 don't you?

13 A. No, all I know is it was green. It appeared to be
14 more of a sweater than a shirt. I can't say it opened
15 in the front.

16 Q. Okay. Now, you say it appeared to be more of a sweater
17 than a shirt, would you tell us what you mean by that?

18 A. Well, it looked like a sweater more than a shirt which
19 buttons down the front. It seems to me it was a pull-
20 over, but I just can't recall.

21 Q. A T shirt is a pullover?

22 A. So is a banlon.

23 Q. Yes. In other words, you are not relying on the fact
24 it was a pullover?

25 A. I really go more on the material. It seems as though

1 the material wasn't a shirt material.

2 Q. It was more of a heavier rougher nature?

3 A. For some reason it struck me as not being what I would
4 call a shirt.

5 Q. Is there anything else you recall about this garment
6 that Mr. Cannon had on, did it have a high neck, for
7 example?

8 A. I couldn't say.

9 Q. Do you recall whether it was worn outside the trousers
10 or inside?

11 A. I couldn't recall, sir.

12 Q. This other gentleman who had a green garment on the
13 upper part of his body, describe that garment for me?

14 A. I don't know, it was just green.

15 Q. The thing that stands out in your memory is that it
16 was green?

17 A. There are two reasons I recall the color. I believe
18 I recall the color because the witness had observed
19 that color on him on the night of the attack, and
20 therefore I wanted to get a similar color on at least
21 one or more of the individuals in the lineup.

22 Q. So as you were picking people for the lineup, you
23 were consciously looking for some one who had a green
24 garment?

25 A. That is right.

1 Q. And out of forty or fifty people you only found one
2 such person?

3 A. That is correct.

4 Q. Now, we are talking about the green garment that this
5 person was wearing, can you describe the substance
6 of that garment, was that more like a sweater or a
7 shirt?

8 A. That was almost identical to the one Cannon was wearing

9 Q. Well, if you don't mind, tell us in what way, what
10 type of surface did it have?

11 A. It appeared to be of the same material, it appeared
12 to be of the same length, it appeared almost identical,
13 I recall that very vividly.

14 Q. Do you recall the hue, was it dark green or light green

15 A. I don't recall. It was a sharp green.

16 Q. How about the green on Cannon's shirt, do you recall
17 the hue on that?

18 A. There were very similar. I believe they were shirts
19 that were popular at that time.

20 Q. Isn't it a fact, Officer, that the thing that stands
21 out clearest in your mind was the fact they were both
22 green?

23 A. I stated that.

24 Q. I understand, but I am asking you more. Isn't that
25 the clearest recollection that you have?

1 That and it seemed to be more of a sweater shirt than
2 a regular shirt.

3 Q. This shirt or whatever the other gentleman had, was
4 that also a pullover of some type?

5 A. It was similar to what Mr. Cannon had on. I don't
6 recall if it was a pullover.

7 Q. There is no question in your mind, Officer, that with
8 only one person with a green garment, with no other
9 available supply where you could get other green
10 garments for the others to wear, you would certainly
11 select that individual for the lineup, given the
12 fact he was approximately the same age, race, height
13 and weight as Mr. Cannon, is that correct?

14 A. That is correct.

15 Q. So that his selection was an easy selection, I mean it
16 was a clear selection?

17 A. Yes.

18 Q. And once you had picked him out, you did not have
19 occasion to look him over carefully beyond that?

20 A. Other than his age, his height, his weight.

21 Q. You noticed him, but you didn't take specific note
22 as to the quality of the shirt --

23 A. No.

24 Q. -- or the length of the sleeves?

25 A. No, nothing was put down on paper in that regard.

1 Q. Now, as the lineup was going on, part of the time you
2 were in the observation room looking through the one
3 way glass with Mrs. Ripple, is that right?

4 A. Yes, sir.

5 Q. And part of the time you were moving between the two
6 parts of the room, if you will, the observation room
7 and the room where the men were standing?

8 A. That is correct.

9 Q. Is that right?

10 A. Yes.

11 Q. Do you recall how long Mrs. Ripple was in the obser-
12 vation room?

13 A. Probably five to ten minutes.

14 Q. Five to ten minutes?

15 A. Maybe fifteen at the most.

16 Q. Fifteen do you think, possibly?

17 A. Possibly.

18 Q. Were these men in her view all this time?

19 A. Yes.

20 Q. And they were in your view during a good portion of
21 this time?

22 A. I would say just about all the time, from one room
23 or another.

24 Q. When was the last time that you read the transcript
25 that the district attorney showed you, Officer, please?

1 A. Yesterday.

2 Q. Had you read it before then, I mean within the last
3 year?

4 A. No, sir.

5 Q. Now --

6 THE COURT: Is this the transcript of the trial?

7 MR. GARDNER: This was the Wade hearing transcript, your
8 Honor.

9 THE WITNESS: It was a transcript of the trial.

10

11 BY MR. GARDNER:

12 Q. It was a transcript of the trial?

13 A. Yes, sir.

14 Q. You did not have occasion to see the transcript of
15 your testimony at the Wade hearing, did you?

16 A. No, sir.

17 MR. GARDNER: May I have just a moment, your Honor?

18 THE COURT: Yes. Officer Mahoney, about how many
19 lineups do you attend on the average during
20 the year?

21 THE WITNESS: Oh, probably -- myself, about probably six
22 or eight a year, sir.

23 THE COURT: Now, is it the practice of your department
24 to take photographs of the individuals who
25 stand in the lineup?

1 THE WITNESS: It is now, sir. It wasn't the practice in
2 1963. I believe it started a year later.
3 THE COURT: Do you remember when it started?
4 THE WITNESS: It was after this, I think it was 1969.
5 THE COURT: This happened in '68. Now, was there any
6 record made of people who did stand in the
7 lineup at that time?
8 THE WITNESS: Yes, sir.
9 THE COURT: Their height, weight, coloring and so forth?
10 THE WITNESS: No, just their names, sir, and the order of
11 position they were in lineup.
12 THE COURT: Only names?
13 THE WITNESS: Yes, sir. At that time that's the only
14 criteria they used for the lineup.
15 THE COURT: Nothing was put down about their dress or
16 weight or anything like that?
17 THE WITNESS: No, sir.
18 THE COURT: In this lineup, in addition to Mrs. Ripple,
19 who else was there?
20 THE WITNESS: The subjects.
21 THE COURT: The subjects, the people in the lineup,
22 Mrs. Ripple and yourself?
23 THE WITNESS: Lt. George Reiss and Detective Dan Funk.
24 THE COURT: And no one else?
25 THE WITNESS: No one else, sir.

1 THE COURT: Did anyone else view this group beside
2 Mrs. Ripple?

3 THE WITNESS: Not while I was present.

4 THE COURT: Go ahead.

5 MR. GARDNER: May I approach the witness, your Honor?

6 THE COURT: Sure.

7
8 BY MR. GARDNER:

9 Q. I show you a transcript -- perhaps, your Honor, if
10 you will, I would like to mark this as defendant's
11 exhibit --

12 CLERK: Defendant's exhibit?

13 MR. GARDNER: Well, we are the petitioner, your Honor.
14 This is a Wade hearing, I guess technically
15 we are a defendant.

16 THE COURT: You are the petitioner.

17
18 (Thereupon transcript referred to was
19 marked Petitioner's Exhibit 1 for identif-
20 ication.)

21
22 MR. GARDNER: For the record, this is a transcript of
23 various proceedings in the trial court,
24 which I will identify at greater length
25 later.

1 BY MR. GARDNER:

2 Q. Officer Mahoney, I show you Petitioner's Exhibit 1
3 for identification, and direct your attention to Page
4 109 in that volume, would you observe there that that
5 is the commencement of the testimony which you gave
6 in connection with the Wade hearing?

7 A. Yes.

8 Q. You have to speak up.

9 A. Yes, sir.

10 Q. Now, calling your attention, Officer, to Page 111,
11 were you asked the following question: "And could
12 you describe their build and stature in relationship
13 to the defendant Cannon?" Referring, of course, to
14 the other men in the lineup.

15 A. Yes.

16 Q. Do you recall giving the answer: "Yes, they were all
17 within an inch or two or approximately the same height,
18 and approximately the same in weight, and one or two
19 approximately the same in dress." Do you recall that?

20 A. Yes, sir.

21 Q. Your testimony today is that only one was actually
22 approximately the same in dress, is that correct?

23 A. I only saw one green, yes, sir.

24 Q. With regard to that fellow with the green shirt or
25 whatever, do you recall what type of trousers he was

1 wearing?

2 A. Either brown or black, dark.

3 Q. You do recall that?

4 A. Yes.

5 Q. Do you recall his shoes?

6 A. No.

7 Q. Now, going on, further down on that same page, you
8 were asked the question: "Can you tell us what she
9 did -- referring to Mrs. Ripple -- when they were
10 presented to her?" These gentlemen were presented
11 to her. Will you read to yourself the answer which
12 you gave to that question?

13 A. This question?

14 Q. Yes.

15 A. Read it?

16 Q. Read it to yourself.

17 A. (Witness examines transcript.)

18 Q. Did you testify at that time that Mrs. Ripple looked
19 over the gentlemen very carefully and picked out Mr.
20 Cannon?

21 A. Yes, sir.

22 Q. And she told you at that time, according to your
23 testimony, that that was the man who had attacked her,
24 is that right?

25 A. Yes.

1 Q. Now, looking again at Page 114 of the transcript, at
2 the bottom of the page, do you recall being asked the
3 question: "Did you say anything to Mrs. Ripple about
4 any of these individuals in the lineup?"

5 A. Yes, sir.

6 Q. Do you recall giving the answer: "No, I just told
7 her that I would like to have her look at each of
8 the three men to see if any of them may have been the
9 person involved in the attack on her."

10 A. Yes, sir.

11 Q. That was your answer, right?

12 A. Yes, sir.

13 Q. Then on the next page were you asked another question:
14 "And about how long did she look at these men?" Did
15 you answer: "Well, not over a minute, possibly forty-
16 five seconds to a minute." Was that your answer?

17 A. Yes, sir.

18 Q. So when you testified today that she was there approx-
19 imately five minutes or perhaps fifteen minutes, would
20 you say that the testimony you gave in 1968, that it
21 was not over forty-five seconds or a minute, was more
22 likely to be correct than your testimony today?

23 A. The way I interpreted the question, it said each man,
24 each man. Each man has to step forward, say his name,
25 turn left, turn right and step back. It takes about

1 Q. All right. The question read: "And about how long
2 did she look at these men?"

3 A. The way I interpreted it was each man.

4 Q. If we take your interpretation at the present time,
5 that would be forty-five seconds to a minute times
6 five, that would make up the five minutes, is that
7 correct?

8 A. There would be no way you could run a lineup in less
9 than five minutes.

10 Q. Looking down further on Page 115, after you testified
11 that she had identified Cannon, do you recall being
12 asked the question: "How did she do that, do you
13 remember what the substance of her words or actions
14 was?" And the answer: "Well, in substance, 'That's
15 the one right there' or 'That's the man right there.'
16 pointed to Mr. Cannon."

17 A. Yes, sir.

18 THE COURT: Mr. Gardiner.

19 MR. GARDINER: Yes, your Honor.

20 THE COURT: Just pardon me a moment.

21
22 BY MR. GARDINER:

23 Q. Back on Page 115 of Exhibit 1, were you then asked
24 the question: "Were any directions given to Mr. Cannon,
25 as far as you know?" And you answered: "Directions?"

1 And the question was asked again: "As to what he should
2 do or say while in the lineup?" Did you answer: "No,
3 sir, just to stand up and face the mirror." Question:
4 "Did you give these directions?" Answer: "No, the
5 detectives did." That was your testimony at the time
6 of the Wade hearing, is that correct?

7 A. Yes, sir.

8 Q. Yet this morning you have talked about directing him
9 to turn and show the side of his face, have you not?

10 A. Yes, sir.

11 Q. And did you state on direct examination some other
12 directions that you gave to Mr. Cannon in the course
13 of the lineup?

14 A. Just to show his profile.

15 Q. In the course of the earlier testimony at the Wade
16 hearing, you made no reference to any of those direct-
17 ions, did you?

18 A. No, I wasn't asked.

19 Q. Well, you were asked in here: "Were any directions
20 given to Mr. Cannon, as far as you know?" You were
21 asked that question and you said: "No, sir, just to
22 stand up and face the mirror." Isn't that correct?

23 A. Yes. Of course, the other detectives in the room also
24 said something to him. I wasn't the only one there.
25 It is a matter of --

1 Q. Isn't it clear that this question called for you to
2 report any directions given to Cannon, whether by you
3 or your assistants?

4 A. On a question like that it is very often directed at
5 you, and it means did you do it or somebody else.

6 Q. Isn't it clear, as you read the question right now,
7 that what they were asking was any direction given
8 to --

9 A. No, the question didn't strike me at that time as
10 being anything I directly did.

11 Q. Of course, in your earlier testimony you never said
12 anything about Mrs. Ripple having identified him by
13 his face or used any words to that effect, did you,
14 all you said, referring right here to Page 115 --

15 A. Nobody asked me on there about whether or not she
16 identified him --

17 Q. Would you read out loud, Officer, the question to
18 which I am pointing the pencil, right here, read that
19 into the record.

20 A. "How did she do that, do you remember what the
21 substance of her words or actions was?"

22 Q. What was your answer?

23 A. "Well, in substance, 'That is the one right there.'"

24 Q. Continue.

25 A. Or 'That's the man right there'"

1 Q. And?

2 A. "Pointing to Mr. Cannon."

3 Q. No reference to her having said anything about his
4 face?

5 A. It's not there, no.

6 Q. So, as far as your testimony is concerned, this alleged
7 statement that she made to you is being reported for
8 the first time now, six years after the event?

9 A. No, sir, it was a conversation I already testified to,
10 I spoke to Mrs. Ripple after the lineup.

11 Q. Do you know of any time, Officer, in the past when
12 you have ever reported in any of your testimony this
13 alleged statement by Mrs. Ripple to you at the time
14 of the lineup?

15 A. I have read all this testimony in six years. I may
16 have. It may have been asked of me, I don't know.

17 Q. Well, you said earlier that your recollection today is
18 very clear as to what happened at the lineup, didn't
19 you?

20 A. My lineup procedures are practically the same, as far
21 as the identification goes. I'm going to make sure
22 the witness identifies the person she does identify
23 by his face, not by any garment he wears or by his
24 size, and I know Mrs. Ripple was asked by me if she
25 was sure that was the man, and she said yes. I recall

1 she had requested to look at his profile, and this
2 was done.

3 Q. Whenever you have conducted lineups, you have followed
4 a procedure that in your mind was designed to be
5 sure you got the right man, is that right?

6 A. That is correct.

7 Q. And, as you have stated, your procedure in the way
8 you conducted lineups did not vary?

9 A. That is correct, other than since then we have been
10 photographing them, and having a more extensive
11 review of each person in the lineup as to their height,
12 age, clothing, and what have you.

13 Q. You are assisted in your testimony today by being aware
14 of your invariable practice in conducting lineups
15 generally?

16 A. Yes.

17 Q. And, as you have just testified, you would want a
18 witness to look at the face and identify the face,
19 and so you did it this time, too, did you not?

20 A. They always do, yes, sir.

21 Q. And the witnesses always do identify by the face,
22 don't they?

23 A. No, sir, they do not.

24 Q. Well, any case where you have a positive identification,
25 you have an identification by the face?

1 A. That is correct.

2 Q. Are you aware that in this case Mrs. Ripple was
3 unable to observe the face of her assailant at the
4 time of the crime?

5 A. I was not.

6 Q. You were not aware of that?

7 A. No, sir.

8 Q. Isn't it a fact that in giving your testimony today
9 you are able to state as categorically some of the
10 facts that you have stated because of inferring what
11 must have occurred because you always do it that
12 way, isn't that correct?

13 A. That is not right.

14 Q. Some of your prior answers would indicate that, Officer.
15 We will have to leave that to the Court, won't we?

16 A. If you are talking about certain questions, yes. Other
17 questions, no. You will have to be more specific.

18 Q. I am talking about the testimony that you have just
19 given, but I will let the record stand as it is. In
20 any event, your recollection of the events at this
21 lineup were quite clear, among other things, you
22 mentioned two or three times that Lt. Reiss was one
23 of the other two officers that assisted you in the
24 lineup, is that right?

25 A. Reiss.

- 1 Q. How do you spell that?
- 2 A. R-e-i-s-s.
- 3 Q. I show you Page 114 of your Wade hearing testimony
- 4 and, of course, there you identified your two assistants
- 5 as Messrs. Funk and McDonald, did you not?
- 6 A. Yes, sir, McDonald also helped.
- 7 Q. And Mr. Funk helped?
- 8 A. Yes, sir.
- 9 Q. Nowhere do we see any reference to Lt. Reiss, do we?
- 10 A. He was there.
- 11 Q. Will you examine your testimony and tell me if anytime
- 12 during your Wade hearing testimony you advised the
- 13 Court that Lt. Reiss was there at all, even though
- 14 you were asked who was there to help you?
- 15 A. Well, I don't think Reiss was that helpful, but he
- 16 was there.
- 17 Q. Specifically, for the record, on Page 114 were you
- 18 asked the question on cross examination: "Just you,
- 19 as far as police officers were concerned?" Answer:
- 20 "No, there were two other detectives, Funk and
- 21 McDonald." Question: "Were they in the lineup room,
- 22 too?" Answer: "They were in the lineup room."
- 23 A. Yes, sir.
- 24 Q. You never mentioned Lt. Reiss?
- 25 A. I don't believe Lt. Reiss was in the lineup room. I

1 believe he may have been with Mrs. Ripple. I know
2 that he was not in the lineup room.

3 Q. Well, when you were asked earlier who else was present,
4 you said Reiss and Funk were there, you didn't tell
5 us about McDonald, was that an oversight?

6 A. No, McDonald was there part of the time, not all the
7 time.

8 Q. Any other police officers there while we are about it?

9 A. Not that I recall.

10 Q. So, in any event, we have three now, plus yourself,
11 is that right?

12 A. Lt. Reiss picked up Alton Cannon.

13 THE COURT: We are talking about the lineup. Before,
14 when Mr. Gardner was looking for something,
15 I asked you to tell me who was at the lineup,
16 and you said yourself, Reiss, Funk, the
17 men standing in the lineup, including Cannon,
18 and Mrs. Ripple.

19 THE WITNESS: Yes, sir.

20 THE COURT: Now, after some reflection, you say that
21 Mr. McDonald was there?

22 THE WITNESS: Yes, sir, he was.

23 THE COURT: Is your testimony that Reiss was there or
24 he was not there?

25 THE WITNESS: Well, when we talk about being there, we

1 are talking not necessarily about the
2 lineup room, it would be in the room with
3 Mrs. Ripple or it could be out in the
4 hallway adjoining. On the case itself
5 was Lt. Reiss, Detective Funk, George
6 McDonald and myself.

7 THE COURT: I am not talking about who the officers
8 were that were assigned to investigate.
9 You have a viewing room and the room where
10 the men stand in the lineup?

11 THE WITNESS: Yes, sir.

12 THE COURT: The men who were in the lineup were stand-
13 ing in that room?

14 THE WITNESS: Yes, sir.

15 THE COURT: And then you look through a glass or some-
16 thing?

17 THE WITNESS: Yes, sir.

18 THE COURT: And that is a separate room?

19 THE WITNESS: That is correct.

20 THE COURT: Mrs. Ripple was there?

21 THE WITNESS: Yes, sir.

22 THE COURT: You were there?

23 THE WITNESS: Yes, sir.

24 THE COURT: Now, was Mr. Funk there?

25 THE WITNESS: Yes, sir. Well, not in the lineup room,

- 1 he was in and out. He went from one room
2 to the other.
- 3 THE COURT: He was in and out?
- 4 THE WITNESS: I believe he was in and out of both rooms.
- 5 THE COURT: What about McDonald, was he in or out?
- 6 THE WITNESS: He was there part of the time.
- 7 THE COURT: And Lt. Reiss?
- 8 THE WITNESS: Lt. Reiss was either in the hall or in the
9 room with Mrs. Ripple, I'm not sure.
- 10
- 11 BY MR. GARDNER:
- 12 Q. New men came on duty at eight o'clock that morning,
13 did they not?
- 14 A. Yes, sir.
- 15 Q. Lt. Reiss, had he been on duty over the night shift?
- 16 A. Yes, sir.
- 17 Q. His tour of duty would have ended at eight a.m., is
18 that correct?
- 19 A. Normally, yes, sir.
- 20 Q. And the lineup was at nine or shortly thereafter?
- 21 A. Nine o'clock.
- 22 MR. GARDNER: That is all we have, your Honor.
- 23 THE COURT: All right. Mr. Odian, anything?
- 24 MR. ODIAN: No redirect, your Honor. Thank you.
- 25 THE COURT: Any other evidence?

- 1 MR. ODIAN: No, your Honor.
- 2 THE COURT: Do you rest, Mr. Odian?
- 3 MR. ODIAN: Yes, we do, and I have in mind, your Honor,
- 4 as I understand it, the single issue or the
- 5 single mandate down from the Second Circuit
- 6 is to the lineup.
- 7 THE COURT: I want to get the procedure right. You
- 8 rest?
- 9 MR. ODIAN: We rest.
- 10 THE COURT: Mr. Gardner?
- 11 MR. GARDNER: We would like to offer in evidence Plaintiff'
- 12 Exhibit 1 for identification, and I would
- 13 define that to the Court as being a tran-
- 14 script of the proceedings of the trial and
- 15 of the Wade hearing and the Huntley hearing
- 16 before the State Court. We offer it prim-
- 17 arily in terms of the Huntley hearing
- 18 transcript, but there may be references
- 19 in our argument to certain other material
- 20 in there relevant to the issue.
- 21 THE COURT: I would think it is part of the evidence,
- 22 all the proceedings, the trial, the various
- 23 hearings, I will consider it all.
- 24 MR. GARDNER: I agree. I am not trying to restrict the
- 25 Court's consideration. I just want it clear

1 that we are putting in affirmative evidence.
2 THE COURT: I appreciate that.
3 MR. GARDNER: We have no witnesses to produce. As I said,
4 I had hoped that Mr. Cannon would be here.
5 What I propose to do --
6 THE COURT: Let's put Mr. Cannon aside for a moment.
7 The others here -- Mrs. Ripple is still
8 living?
9 MR. ODIAN: I don't know that myself, your Honor, to
10 tell the truth.
11 THE COURT: What about Officer Reiss, is he still a
12 member of the Rochester Police Department,
13 Mr. Mahoney?
14 THE WITNESS: Yes, sir.
15 THE COURT: Funk?
16 THE WITNESS: Yes, sir.
17 THE COURT: McDonald?
18 THE WITNESS: Yes. He is retired, McDonald, but he is
19 available.
20 THE COURT: He is living in the Rochester area?
21 THE WITNESS: Yes, sir.
22 THE COURT: Mr. Odian, today is the day for the hearing,
23 and I want to make sure here that these
24 men are still available, living and avail-
25 able. You don't know about Mrs. Ripple?

1 MR. ODIAN: No, but I will certainly try to verify --
2 THE COURT: No, no, today is the hearing day.
3 MR. ODIAN: I don't know.
4 THE COURT: Now, do you desire, Mr. Gardner, to -- what
5 next step do you suggest we take?
6 MR. GARDNER: I wish, first of all, to tell the Court
7 that Mrs. Ripple is alive and living in
8 the Rochester area, according to our own
9 investigation, which resulted from a few
10 calls out of the Rochester telephone
11 directory.
12 THE COURT: I will consider that. Unless you can verify
13 it with a death certificate, I will consider
14 that Mrs. Ripple is living, and there is no
15 reason shown why she is not available. I
16 want you to understand, Mr. Odian, so that
17 you are not taken unawares, in a hearing
18 like this, I am sort of suprised that she
19 isn't here. Maybe in your judgment there
20 is nothing she could add, because, as I
21 understand it, she testified at the former
22 hearing and she could not remember anything
23 about green sweaters, colored sweaters or
24 anything. So that if an argument is made
25 that failure to call her should be taken

1 adverse to your position, I don't want you
2 to be suprised about it.

3 MR. ODIAN: I won't be, your Honor. In our judgment,
4 we brought Mr. Mahoney here as our witness.

5 MR. GARDNER: Your Honor, we have no oral witnesses to
6 present. As I told the Court, I would urge
7 my client not to take the stand. I do not
8 think it is appropriate. He has testified
9 before, he can add nothing. On the other
10 hand, it is an assigned case, and I don't
11 want to create another issue of due process,
12 so I would like to reserve the right, after
13 I have made a motion for judgment as a
14 matter of law, and after the Court has
15 had an opportunity to review that, I will
16 advise the Court that I will go to Attica
17 this coming week and consult with my client,
18 and advise him that he should not take the
19 stand, and obtain his written consent,
20 whereupon it will be finally submitted.

21 THE COURT: Are you going to submit a memorandum?

22 MR. GARDNER: We will submit a memorandum -- depending
23 upon the Court's wish -- I think we should
24 submit a memorandum, definitely. If the
25 Court is disposed to hear him, my co- counsel

1 is very well versed in this case on the
2 law and on the facts, and it may be that
3 he could assist. Otherwise, if the Court
4 prefers, we will submit everything in
5 writing.

6 THE COURT:

7 Mr. Provorny, after what the Second Circuit
8 said about you, if I didn't listen, I would
9 think I would certainly be depriving myself
10 of a splendid representation. I don't
11 think at this time it would be helpful,
12 frankly, to hear anything. I hate to have
13 you come back. Is there anything you
14 think you ought to say to me?

15 MR. PROVORNY:

16 I think there are at least two things, but
17 first I would like to hand your Honor an
18 excerpt from a current opinion by Judge
19 Lumbard in a case that came down last
20 Friday, called Rawls against Manson, where
21 Judge Lumbard joined Judge Friendly in
22 indicating that there is at least a very
23 serious question as to whether the petitioner
24 committed the crime for which he was con-
25 victed. I want to point out that the
evidentiary testimony at the Wade hearing,
the first Wade hearing, consisted of only

seventeen pages. In those seventeen pages there is not a single bit of evidence presented as to Mrs. Ripple's observations, if any, at the time the crime was allegedly --

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5 THE COURT:

As I understand it, the Second Circuit, it would appear to me -- I suppose this is always open for argument, even appellate courts make mistakes -- but here the court pointed out at Page 178 of the slip opinion: "In addition, her testimony at trial revealed that she had never seen assailant's face."

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12 MR. PROVORNY:

That is correct, and the prosecution conceded that in its brief to the Appellate Division. It said it was evident by the time that cross examination at trial had been concluded that Mrs. Ripple could not identify the appellant as her assailant, the best she could do is indicate there was somebody who was walking across the street from her, in a direction away from her, several minutes before the alleged attack took place. Beyond that I really have no more to say. We will submit a memorandum.

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25 MR. GARDNER:

Your Honor, with the Court's indulgence,

- 1 and having in mind that we will want to
2 prepare a memorandum, and I should share
3 it with my co-counsel, I would like about
4 ten days to two weeks to submit it.
- 5 THE COURT: Well, I would think, because of the mailing
6 situation, and so forth -- why don't we
7 say three weeks. If you get it in ahead
8 of time, fine.
- 9 MR. GARDNER: We will do the best we can.
- 10 THE COURT: Mark it on our calendar for the 5th of
11 August, Mr. Walsh. Mr. Odian, the same
12 time, three weeks.
- 13 MR. ODIAN: Well, after getting theirs, you mean?
- 14 THE COURT: I think you could -- the issues are simple --
- 15 MR. ODIAN: Three weeks from today?
- 16 THE COURT: Yes.
- 17 MR. ODIAN: Sure.
- 18 THE COURT: You might also, Mr. Odian, face up to this,
19 if the Court finds that the procedures here
20 were impermissibly suggestive, then what
21 happens after that, and also I would like
22 to have your suggestions in that regard,
23 Mr. Gardner and Mr. Provorny.
- 24 MR. GARDNER: Yes, your Honor.
- 25 THE COURT: Thank you very much.

1 MR. ODIAN: Thank you, your Honor.

2 MR. GARDNER: Thank you, Judge.

3
4 (Thereupon the court was in recess.)
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13 I hereby certify that this record is a
14 true and accurate transcript from my
15 stenographic notes in this proceeding.

16 *Harry T. Noel*
17 Official Reporter
18 U. S. District Court
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them over carefully.

Q. He didn't mention any one particular individual?

A. No.

MR. BEER: All right. Thank you, no further questions.

REDIRECT EXAMINATION BY MR. BERGIN:

Q. Mrs. Rippel, the man you identified here in court today as being the person in the line-up, is he the same person that attacked you on that night?

A. Yes, he is.

MR. BERGIN: Thank you. That's all.

MR. BEER: No further questions.

MR. BERGIN: Det. Mahoney.

W I L L I A M M A H O N E Y, called herein as a witness, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. BERGIN:

Q. Will you tell us where you are employed, sir?

A. Rochester Police Department.

Q. And you are with the Detective Bureau?

A. Yes.

Q. And you were investigating a certain matter involving a

-110-

Mrs. Shirley Rippel, were you Detective?

A. Yes, I was.

Q. And did there come a time on September 5th that you arranged a line-up for Mrs. Rippel?

A. Yes, sir, the morning of September the 5th at a little after 9:00 A.M.

Q. And can you tell the Court where this was conducted, how it was conducted?

A. Yes, sir. It was conducted on the fourth floor of the Detective Division. It is two rooms that are back to back at the beginning of the security area, as you enter the fourth floor security area. One room contains a desk, several chairs and a one-way mirror. On the other side of the one-way mirror is where the defendant Alton Cannon and four other persons were brought, and it is a lighted room. And all it is on their side is a mirror that they can see themselves in.

Q. And who were the other persons in the line-up besides Alton Cannon?

A. It was an Alfred Albert, a Willis, Willie Ames, Thomas Tindel, William Williams, and the fifth person was the defendant. They were lined up left to right in that order that I just read them. So the defendant Mr. Cannon would

-111-

be to the right of anybody identifying him on the other side of the mirror.

Q. And were these colored or white people?

A. They were all male Negroes.

Q. And could you describe their build and stature in relationship to the defendant Cannon?

A. Yes. They were all of within an inch or two or approximately the same height and approximately the same in weight.

And one or two approximately the same in dress.

(K) Q. And were you with Mrs. Rippel when these people were presented to her through the mirror?

A. Yes, I was.

Q. Can you tell us what she did when they were presented to her?

A. Yes. I had the men lineup in the room and I brought Mrs. Rippel in on the other side with the mirror. And I told Mrs. Rippel to just go in there and sit down and to look over carefully the men that would be on that other side of that mirror, and to see if any one of those were or were not involved in the crime that was perpetrated on her on August 31st. She looked them over very carefully and picked out Mr. Cannon, who was to her far right, and would be No. 5 in the line-up. And she said that was the man that

attacked her.

Q. Now, did you have any conversations with the defendant Cannon before Mrs. Ripple was asked to look at these men?

A. Yes. Before I took Cannon into the line-up room I informed him once again that he had the right to the services of a lawyer, that he was going in there for the purpose of identification; and that he had the right to have a lawyer present with him during the line-up. And I also advised him that he had the right to refuse to go in the line-up if he so desired.

Q. What did he respond to these advisements?

A. He said he was willing to cooperate, that he wanted to straighten out the problems he was involved in. He agreed to go in there and said he did not want a lawyer present. He was brought in the room and -- along with four other persons.

MR. BERGIN: Thank you, sir.

CROSS-EXAMINATION BY MR. BEER:

Q. What time did this line-up commence, Detective?

A. Right after 9:00 A.M. About 9:15, 9:10 to 9:15.

Q. And is this conducted in a small room? What's the type of room there?

A. It's used to keep the lie detector machine.

Q. Relatively small room is it?

A. Yes, very small.

Q. And the people in the line-up stand beyond a one-way mirror, do they?

A. Yes.)

Q. How far is that mirror away from the people in the audience?

A. Oh, about three, four feet from where they would be sitting.

Q. I didn't hear that last.

A. The persons viewing the persons in the line-up would be sitting approximately three to four feet from the mirror. The persons who are in the line-up are standing approximately five feet back from the mirror itself, so that they can be viewed from head to toe, and the different poses.

Q. But, the people who are in the line-up cannot see who is looking at them?

A. Oh, definitely not. No, sir.

Q. Now, you went in there with this defendant, did you, about 9:15, to this room?

A. About 9:10.

Q. 9:10? Had you been with him right along then?

A. Yes, I had.

Q. I think you testified earlier that you questioned him from

eight-thirty to eight forty-five. Thereupon the stenographer came in?

A. Yes.

Q. Were you there when the stenographer was there all that while?

A. Yes, I took the statement.

Q. And when that was over with you then took the defendant yourself to the line-up room?

A. Yes.

Q. Just you as far as police officers were concerned?

(K) A. No, there was two other detectives, Funk and Mc Donald.

Q. Were they in the line-up room too?

A. They were in the line-up room. I went with Mrs. Rippel to the other side of the mirror, to the other office.

Q. They weren't seated with you and Mrs. Rippel then?

A. No, the detectives had the five men in the line-up. I went from there through another door into another room with Mrs. Rippel.

Q. Did you say anything to Mrs. Rippel about any of these individuals in the line-up?

(X) A. No. I just told her that I'd like to have her look at each of the five men to see if any of them may have been the person involved in the attack on her.

Q. And about how long did she look at these men?

(C) A. Well, not over a minute. Possibly forty-five seconds to a minute.

Q. And what did she say or do then?

A. She identified Alton Cannon as the person.

Q. How did she do that? Do you remember what the substance of her words or actions was?

(K) A. Well, in substance, "That's the one right there.", or, "That's the man right there." Pointed to Mr. Cannon.

Q. Were any directions given to Mr. Cannon as far as you know?

(X) A. Directions?

Q. As to what he should do or say while in the line-up?

(X) A. No, sir. Just to stand up and face the mirror.

Q. Did you give these directions?

A. No, the detectives did.

Q. Could you hear that?

A. Yes, I can. There is a sound machine.

Q. And that was all he was told?

A. That's all they were told, yes, sir.

Q. Did Mr. Cannon utter any words himself?

A. No, sir.

Q. Now, when did you give this advice about a lawyer that you claimed you gave to Mr. Cannon concerning -- just talking

now about this line-up?

A. Well, it would be after the stenographic statement and just prior to going into the line-up room.

Q. Well, what did you say to him?

A. I told him that he had the right to the services of a lawyer, that we would like to conduct a line-up in which case he could be identified; that he had the right to have a lawyer present before the line-up and during the line-up if he so desired. He said, "I want to cooperate.", that he was sorry for the three incidents he explained to me, the trouble he had gotten into. And he said he didn't want a lawyer present and he would go through the identification and the line-up.

Q. Was the stenographer still there at that time or had he left?

A. I believe he had left.

Q. So there's no stenographic transcript as far as that advice is concerned?

A. No. Because the -- Mrs. Rippel hadn't arrived while the stenographer was there.

Q. You didn't use a card again, I take it, to give him that advice?

A. No. I did not, no.

Q. But, you recall distinctly giving him that advice?

A. Distinctly, yes, sir.

Q. Was any other detective present at the time?

A. Yes, there was.

Q. And who was that?

A. Detective Funk.

MR. BEER: All right, sir, no further questions.

MR. BERGIN: I have no further questions. People rest on this hearing, Your Honor.

MR. BEER: Mr. Cannon.

THE COURT: Excuse me. I'd like to ask your indulgence, Mr. Beer, on a short recess. We have a meeting upstairs. It shouldn't run too long.

MR. BEER: Surely, Your Honor.

THE COURT: All right, the Court will stand in recess.

(Whereupon Court recessed at 3:29 P.M. - reconvened at 4:03 P.M.)

THE COURT: Okay, Mr. Beer.

MR. BEER: All right, Judge. Mr. Cannon.

A L T O N C A N N O N, called herein as a witness on behalf of the defendant, having first been duly sworn, was examined and

now?

MR. BEER: Yes, Your Honor.

THE COURT: All right. Then what we'll do, we'll take a very brief recess and then we'll reconvene immediately thereafter.

(Whereupon court recessed at 3:45 P.M. - reconvened at 4:00 P.M.)

THE COURT: Gentlemen, I take it we'll continue to waive polling of the jury after each recess, and may the record show the defendant and counsel are present?

MR. BERGIN: Yes, Your Honor.

MR. BEER: Yes, Your Honor.

THE COURT: All right, Mr. Bergin, you may proceed.

MR. BERGIN: People call Mrs. Rippel please.

SHIRLEY RIPPPEL, called herein as a witness on behalf of the People, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. BERGIN:

Q. Mrs. Rippel, do you want to speak up so I can hear you over here and tell us where you live please?

A. 39 Lewis Street.

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Q. And is that in the City of Rochester?

A. Yes.

Q. Exactly where is that?

A. It's between Scio and North Street.

Q. And you are married, is that correct?

A. Yes.

Q. And do you have any children?

A. One.

Q. How old is your child?

A. Two.

Q. Boy or girl?

A. Girl.

Q. Do you mind telling us your age?

A. I'll be twenty-one in two weeks.

Q. And do you recall being with your husband and other members of your family at Helfer's Restaurant in the City?

A. Yes.

Q. And when was that?

A. August 31st, on a Friday night.

Q. Friday night?

A. Yes.

Q. What time did you go to the restaurant?

A. I think it was between nine-thirty and ten.

A-69

Q. And who did you go there with?

A. My husband, my father and mother and sister.

Q. And did there come a time when you left the restaurant by yourself?

A. Yes.

Q. Why was that that you went by yourself?

A. My husband and I had a little argument and I left.

Q. Where were you going?

A. Home.

Q. And where is Helfer's Restaurant?

A. It's on Henrietta Street.

Q. What general area is Henrietta Street in?

A. Well, it's off Clinton Avenue South, runs off of Clinton Avenue South.

Q. Is there a theater around that general area?

A. Yes.

Q. What's the name of that theater?

A. Cinema.

Q. The Cinema Theater? Will you tell the members of the jury what occurred and where you went after you left the restaurant?

A. Well, I was on my way home -- you want the way I went home?

Q. Well, you were walking, were you?

A. Yes.

Q. Did there come a time when you were walking down Alexander Street?

A. Yes.

Q. Did you go by the hospital on Alexander Street?

A. Yes.

Q. Will you tell us what happened as you were walking down Alexander Street?

A. I saw Alton Cannon across the street from the 24 Hour Store.

Q. Where is the 24 Hour Store?

A. It's on Alexander Street.

Q. What kind of a store is that?

A. It's a grocery store. It stays open 24 hours.

Q. And on what side of Alexander Street were you walking?

A. I was walking on the right hand side.

Q. And you were going towards East Main Street?

A. Yes.

Q. And you would be on the side of the street that the hospital is on?

A. Yes.

Q. Where was this person you called Alton Cannon when you first saw him?

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MR. BEER: Your Honor, I object to the reference "Alton Cannon" at this point. I think it's out of order in the proof.

THE COURT: All right. Why don't you have her allude to someone, Counselor, without specifying it at this time.

Q. There came a time when you saw this person. Where was he when you first saw him?

A. He was right next to Kramer's Restaurant on Alexander Street.

Q. Is that in the Medical Arts Building?

A. Yes.

Q. Restaurant is in the building?

A. Yes.

Q. And is this on the opposite side of the street that you were on?

A. Yes.

Q. What was he doing? Will you describe to the jury what you saw about him?

A. He was just standing there when I saw him.

Q. And what did you do?

A. I just kept walking.

Q. And did you have occasion to see this person again?

A-72

next is
Denny's
Rest.
now

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A. Yes.

Q. Where was that?

A. The gas station on the corner of University Avenue and Alexander.

Q. Where were you when you noticed him?

A. Right across the street.

Q. You stayed on your same side of the street?

A. Yes.

Q. And what was he doing in the gas station?

A. Well he started to cut through the gas station. When I looked over -- well, he was looking at me and he was cutting through it.

Q. Were there any lights in that area?

A. Yes.

Q. What lights were there?

A. Right near the pumps.

Q. The pump lights on?

A. Yes.

Q. Was the gas station open for business, could you tell?

A. No, it wasn't.

Q. But, the lights were on? Were these overhead lights or how would you describe the lights?

A. Oh, they were bright enough I could see him. He was right

under them.

Q. Okay. Then what happened?

A. Well, I kept walking. I crossed the street and I didn't h
him come up behind me, but the next thing I knew somebody
had a knife to my throat.

Q. What did the person do? What did he say and what happened?

A. He told me to go with him and do as he says and he wouldn't
hurt me. And I told him that I was married and I had a
baby, and he didn't seem to say anything or didn't care.
And he just -- well, he started to choke me. Then I kept
telling him to let me go and he started pushing me in the
back of the old East High.

Q. What happened as you were pushed back there?

A. Just kept telling me to do as he says. And he pushed me
back there. And he stayed behind me and took my skirt off
and he put it over my head. And I told him I couldn't
breath with it on. And he told me that was so I couldn't
identify him and go tell the police. And then I think he
knocked me to the ground. I don't remember getting on the
ground. And he took my under clothes off and he got on
top of me and had intercourse with me. And he told me to
stay there -- well --

Q. You say he had intercourse with you? Now, did he penetrate

your body?

A. Yes.

Q. Did he say anything to you at this time at all?

A. Yes.

Q. What did he say?

A. He asked me if he was as good as my husband. And he told me that he liked white girls.

Q. Was this a white person or a colored person?

A. Negro.

Q. What happened then?

A. Well, he told me -- well, a few times I lifted my head and he pushed it back down to the ground. And he told me just to stay still, he'd be through in a minute then he'll be gone. And he got up and -- well, he told me again just to stay there, and he was gone.

Q. What did you do when he left?

A. I got up and I ran out to the front. Well, I pulled my underwear up and I put my skirt on and I ran out to the front, and I looked to see if I could see where he went, and I couldn't find him. And I started to run home.

Q. Was anyone home when you got home?

A. Yes.

Q. Was your husband there?

A. No.

Q. He was not home yet? With whom do you live?

A. My husband.

Q. And do your parents live there in the same house?

A. Downstairs.

Q. And you live upstairs with your husband and your child?

A. Yes.

Q. Who was home when you arrived home?

A. My mother, father and sister.

Q. And were the police called?

A. Yes.

Q. Did the police come to the house?

A. Yes.

Q. And you made a report of this to them?

A. Yes.

Q. Did you go anyplace from your house then?

A. My husband, father and I went with the police and showed them where it had happened, and from there they took me to the hospital.

Q. What hospital did you go to?

A. Genesee. No, -- yes, Genesee.

Q. Were you examined by a doctor there?

A. Yes.

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Q. And how long did you stay at the hospital?

A. Couple of hours.

Q. And then did you go home then?

A. Yes.

Q. Now, Mrs. Rippel, do you see here in court the person that attacked you on that night?

A. Yes.

Q. Would you point him out please?

A. He's over there.

Q. Would you be a little more specific in your identification?

A. He's sitting right over there.

Q. Well, there are three gentlemen.

A. The Negro male.

Q. Pardon?

A. The Negro male.

MR. BERGIN: May the record indicate that the witness has identified the defendant, Your Honor?

THE COURT: Yes.

Q. Now, while this thing was happening did you get a chance to look at the person?

A. When he first grabbed me.

Q. That's when you were on the sidewalk, were you?

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A. Yes.

Q. You got a chance to see him then?

A. Yes.

Q. Was this the same person you had seen in the gas station and the same person that you saw at Kramer's?

A. Yes.

Q. After the skirt was put over your head could you see him at all after that?

A. No.

Q. And your report to the police, did you describe this person at all?

A. Yes.

Q. About what time did this incident occur on Alexander Street?

A. Between twelve-thirty and one.

Q. This would be early Saturday morning?

A. Yes.

Q. The 31st of August? Now, did there come a time in the middle of the following week when the police asked you to come downtown?

A. Yes.

Q. Do you know when that was?

A. September the 5th.

Q. And will you tell the members of the jury what happened at that time?

A. Detective told me that he wanted me to look at these men in a line-up and see if I could pick him out, if he was there. And we went into a small room with a one-way mirror and I spotted him there. He was in the line-up.

Q. Can you tell us how many -- what this line-up was like?

A. There was five men.

Q. And do you recall if they were white men or colored men in the line-up?

A. They were all Negro.

Q. They were all Negro?

A. Yes.

Q. And you identified this defendant in the line-up, is that correct?

A. Yes.

Q. And is that the same person who you've already pointed out in court here today as the defendant?

A. Yes.

Q. And that's the same person that raped you on that evening, is that right?

A. Yes.

Q. Did you have bruises or injuries on your body at all from

this incident?

A. Yes.

Q. Would you tell us about that?

A. I had bruises on my back.

Q. Whereabouts were these on your back?

A. I don't remember, but I heard the doctor talking to my husband, and some detectives and showing them.

MR. BEER: I object to that as hearsay,
Your Honor.

THE COURT: Yes, I think that -- sustained.

It may be stricken.

Q. You weren't able to see them yourself, were you, or did you see them?

A. I saw them when I went home.

Q. Well, will you tell us what you saw yourself?

A. Well, they looked like cuts from a twig or something.

MR. BERGIN: Thank you, Mrs. Rippel. You
may ask.

CROSS-EXAMINATION BY MR. BEER:

Q. Did you testify before the Grand Jury downtown here, Mrs. Rippel?

A. Yes.

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MR. BEER: May I have those minutes, Mr. Bergin?

THE COURT: Do you have the minutes here, Counselor?

MR. BERGIN: Yes, I have the minutes, Your Honor. I'll give them to Mr. Beer at this time.

THE COURT: Very well.

MR. BERGIN: Pages 3 through 14. I'm sorry. Pages 4 through 14 comprise this here entire testimony.

MR. BEER: May I have a few minutes to look this over, Your Honor?

THE COURT: Certainly. If you think you'll need more time, Mr. Beer, we can excuse the jury. How many pages are there, ten?

MR. BEER: About ten, Your Honor.

THE COURT: Well, all right, we can excuse the jury while you're examining them.

MR. BEER: Perhaps we better.

THE COURT: All right. The jury can be excused.

(Whereupon the jury was excused at 4:16 P.M.)

MR. BEER: All right, Your Honor.

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THE COURT: Very well, the jury may be brought back.

(Whereupon the jury returned to the jury box at 4:23 P.M.)

THE COURT: Ladies and gentlemen, this was not another recess, but simply to give defendant's counsel adequate time to examine the testimony of the witness, which was taken at the Grand Jury. He is entitled to have those minutes made available to him, and of course adequate time in which to examine them. It was felt by me that you might prefer the relatively greater comfort of the jury room than remaining here in the jury box.

Okay, we may continue now. Mrs. Rippel?

SHIRLEY RIPPEL RESUMES THE STAND:

CROSS-EXAMINATION CONTINUED BY MR. BEER:

Q. Now, Mrs. Rippel, as I understand it, it was on the evening of Friday, August 30th that you went down to the Helfer's Restaurant Bar and Grill, is that right?

A. August 31st.

Q. Well, if this alleged crime occurred after midnight, early morning of August 31st, it must have been the night of August 30th, isn't that so?

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A. Oh, yes.

Q. And you were at Helfer's Bar and Grill? Is that what it is, a bar and grill and restaurant?

A. Yes.

Q. And there's a part of it for a restaurant and a part of it for a bar, is that right?

A. Yes. There's a dining room.

Q. And you went there in the company of your husband, sister and mother and father, all went together, did they?

A. Yes.

Q. And you got there at about ten o'clock?

A. Yes.

Q. And stayed there until about twelve o'clock?

A. Yes.

Q. And did you have any alcoholic beverages to drink while you were there?

A. Yes.

Q. And what did that consist of?

A. I had three glasses of beer.

Q. And were the others also drinking? What were they drinking if anything?

A. My mother and father weren't drinking. My husband was, and I don't remember if my sister was.

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- Q. Now, you stated that you got into a disagreement, an argument of some kind with your husband, is that it?
- A. Yes.
- Q. Did that start there, did the disagreement start there at the bar and grill?
- A. Well, not really. It didn't actually start there.
- Q. It started at some earlier time?
- A. Yes.
- Q. And continued there, is that it?
- A. Yes.
- Q. Well, did that disagreement go on for the two hours that you were there?
- A. Off and on.
- Q. And you were somewhat upset by that?
- A. Yes.
- Q. And then there came a time when you simply left the place?
- A. Yes.
- Q. And did you tell the other people you were leaving?
- A. Yes.
- Q. And including your husband?
- A. Yes.
- Q. And you then walked out and proceeded to walk home, is that right?

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A. Yes.

Q. And where you lived at 39 Lewis Street, that's quite a long ways from this Helfer's Bar and Grill, is it not?

A. Yes.

Q. And you were walking that entire distance?

A. Yes.

Q. Now, what route did you walk, do you recall that?

A. Yes.

Q. What streets?

A. I walked down to Clinton Avenue South, to Meigs, down to Broadway, and off Broadway I went on Averill Avenue to Monroe Avenue, and from Monroe Avenue down Alexander.

Q. Monroe to Alexander?

A. Yes.

Q. Then you started to walk up Alexander north?

A. Yes.

Q. Is that right? And you were walking north and you got on the easterly side of the street, is that right?

A. Yes.

Q. Now, Alexander Street crosses East Avenue, does it not?

A. Yes.

Q. And on your way up Alexander Street were there any other pedestrians on the street after you entered upon Alexander

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Street?

A. Yes.

Q. This was about what time?

A. About quarter after twelve.

Q. And you say there were other people walking on Alexander, anybody else walking there?

A. No, not walking.

Q. I saw pedestrians, were there any other people walking?

A. No.

Q. Did cars go by?

A. Few.

Q. And as you walk up Alexander what streets did you cross?

A. I crossed East Avenue -- wait a minute. I went down to University Avenue.

Q. Now, you mentioned that you saw a pedestrian on the other side of the street, of Alexander Street?

A. Yes.

Q. On the westerly side, is that right?

A. Yes.

Q. And near what cross street was that when you saw this pedestrian, or whereabouts on Alexander Street?

A. Right next to the Medical Arts Building.

Q. In other words, you were across the street from the Medical

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Arts Building?

A. Yes.

Q. And you saw this pedestrian in front of the Medical Arts Building across the street from you?

A. Yes.

Q. And was he walking at the time?

A. When I saw him?

Q. Yes.

A. No.

Q. What was he doing?

A. Standing there.

Q. Standing?

A. He was standing there.

Q. And what direction was he facing?

A. He was facing me.

Q. Facing east?

A. Yes.

Q. Had you noticed any parked cars with anybody in them?

A. Yes.

Q. Where did you notice a parked car with someone in it?

A. Right at the curb next to me, right in front of the 24 Hour Store.

Q. 24 Hour Store? That's a delicatessen, is it, grocery store?

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A. Grocery store.

Q. Open 24 hours a day?

A. Yes.

Q. And where is that in relation to the Medical Arts Building?

A. Right across the street.

Q. In other words, this 24 Hour store was on the side of the street where you were?

A. Yes.

Q. And across from the Medical Arts Building?

A. Yes.

Q. And who was in this parked car?

A. Bunch of kids.

Q. How many, four, five?

A. Oh, I'd say there were five or six of them.

Q. Now, you continued walking, did you?

A. Yes.

Q. Now, are you sure this person you saw in front of the Medical Arts Building was -- are you sure he wasn't walking, same as you were walking when you first caught sight of him in front of the Medical Arts Building?

A. When I first noticed him he was standing still.

Q. Well now, do you remember testifying over in the City Court

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at a Preliminary Hearing back on the 20th of September, Mrs. Rippel?

A. Yes.

Q. Now, do you remember testifying over there? Do you remember this question being asked, these questions being asked and these answers being given? Testimony given under oath of course over there. Do you recall that?

A. Yes.

Q. And I was asking these questions at the Preliminary Hearing.

"Q. Or, when you noticed him the first time?

A. No.

Q. Where is he then?

A. He was just beyond the Medical Arts Building.

Q. On the sidewalk?

A. Yes.

Q. Walking the same direction you were?

A. Yes."

Do you remember giving those answers?

A. Yes.

Q. Now, did you then temporarily lose sight of this pedestrian

as you were walking beyond the Medical Arts Building and continuing walking towards your home?

A. No.

Q. Well, when did you notice him again?

A. The gas station right across the street on University Avenue.

Q. And how much longer was that after the time you first noticed him?

A. Just a couple of minutes.

Q. Well, would it be closer to about five minutes?

A. About five minutes I guess.

Q. Now, during that interval of time was this person across the street behind you or in front of you?

A. He was right across from me.

Q. Kept even, about even all the way?

A. Just maybe a step or two behind me, but I could see him out of the corner of my eye.

Q. Now, this gas station at the corner of Alexander and University Avenue, is that fairly close to where you live?

A. Yes.

Q. And what kind of a gas station is that? What kind of gas?

A. I don't know.

Q. And did you notice this person walking through this gas

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station?

A. Yes.

Q. And he was walking away from you at that time, is that right?

A. Yes.

Q. Now, the gas station was closed at that time, was it not?

A. Yes.

Q. Now, you say that there were lights over the pumps, even though the gas station was closed, is that what you say?

A. Yes.

Q. How far away would you say he was from you as he was cutting through that gas station and you saw him?

A. I couldn't say how far.

Q. How wide is Alexander Street, how many lanes wide at that point, do you know?

A. Two.

Q. Then you continued walking north on Alexander and crossed University Avenue, did you?

A. Yes.

Q. And then you continued down Alexander towards the East High School?

A. Yes.

Q. And you say that as you reached the East High School some-

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one grabbed you from behind?

A. Yes.

MR. BERGIN: I object, Your Honor.

THE COURT: What's the basis of your objection?

MR. BERGIN: I don't think that's the testimony. She didn't say someone. She said this fellow.

MR. BEER: I object to that, Your Honor. I object to that interjection.

THE COURT: Well, I'm going to overrule the objection, Mr. Bergin. I think the question of recollection here is entirely that of the jury, and I'll leave it to them.

Q. You say you came opposite the East High School, someone grabbed you from behind?

A. Yes.

Q. About what length of time had gone by between the time you saw someone going through the gas station and the time that someone grabbed you from behind opposite the East High School?

A. It was a minute or two.

Q. At the time you were grabbed from behind, as you recited

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here, you couldn't see the face of the person at that moment who grabbed you from behind, could you, Mrs. Rippel?

A. I turned my head and I saw him.

Q. What's that?

A. I said I turned my head and I saw him.

Q. You saw the face of this person?

A. No, the clothing.

Q. The clothing? My question was, at the time you were grabbed from behind you could not see the face of this person?

A. No.

Q. And from that time forward, throughout this episode, you did not see the face of this person, whoever it was, did you?

A. No.

Q. Did you then engage in a discussion with this person as far as refusal to obey whatever commands he gave you?

A. Yes.

Q. And did that discussion last for a few minutes?

A. Yes.

Q. Did you scream or cry out?

A. No.

Q. Did you notice whether any automobiles passed on the street?

A. No.

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Q. You did not or there weren't any?

A. There wasn't any that I saw.

Q. Were there houses on that street across the street?

A. Yes.

Q. Then somehow the -- he got you to the back or alongside the school?

A. Yes.

Q. You say "saw". Did you see the shirt of this person?

A. Yes.

Q. What color was the shirt?

A. Green.

Q. And at the back or the side of the school you do not remember how you got to the ground, but somehow you got to the ground, is that right?

A. Yes.

Q. Now, when this episode was over -- well, let me ask this first. Did you engage in any struggle with this person?

A. I tried to take the skirt off my head. I was too scared.

Q. And when this episode was over you then went out to the front of the school?

A. Yes.

Q. And did you then proceed to walk towards your home?

A. Yes.

Q. And was there someone else on the street as you were enroute to your home?

A. Yes.

Q. And who was that?

A. There was a young guy in a car.

Q. And what did he do?

A. He pulled up to the curb and he started talking to me, and I got scared and I started running. And he told me that he knew what happened because my clothing weren't on just right. And he told me he'd take me home.

Q. Did he do so then or what?

A. Yes.

Q. And do you know who he is?

A. We've got his name and address.

Q. You don't recall it now?

A. No.

Q. And you say that on September the 5th you were down at the Police Headquarters, and at a line-up down there?

A. Yes.

Q. And had you talked to the police before that relative to this incident? I mean after the -- you talked to the police shortly after the incident occurred, is that it?

A. Yes.

Q. You reached home and when you got home your husband was not home yet?

A. No.

Q. Your parents were home?

A. Yes.

Q. And who called the police, if anybody?

A. My sister.

Q. And how long after you got home did she do that?

A. I was home for not even five minutes.

Q. And they then came to the house, did they?

A. Yes.

Q. And then you saw the police again September 4th, did you, at home or at your mother's?

A. I don't remember.

Q. But, you did see them again September 5th at Headquarters?

A. Yes.

Q. Did you give the police any kind of a description of the individual who you told them had attacked you?

A. Yes.

Q. When did you give them that description, the same night of this occurrence?

A. Yes.

Q. And what was the nature of the description, do you recall

that, what you told them?

A. I told them that he had a green shirt on, dark pants and black shoes. He was a male Negro. He was on the thin side.

Q. On the thin side?

A. Well, he wasn't heavy. That's about all.

Q. Is that what you told them?

A. Yes.

Q. And you came to the line-up and there were how many people in that?

A. Five.

Q. Were they all Negroes?

A. Yes.

Q. When you were first brought in there were all five of them already there or did some come afterwards?

A. When I was in there they were just bringing them in.

Q. They were just bringing them in?

A. Yes.

Q. In other words, as you arrived there your first views of this line-up were these men coming in?

A. When I was in the room?

Q. Yes.

A. Yes.

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Q. When you first got there none of them were there, is that right?

A. Yes.

Q. You say you pointed out this defendant at that time?

A. Yes.

Q. What was he wearing at that time?

A. He was wearing a green shirt and dark pants.

MR. BEER: All right, thank you.

MR. BERGIN: I have no further questions,
Your Honor.

THE COURT: All right, Mrs. Rippel. What's
your program, Mr. Bergin?

MR. BERGIN: I have other witnesses. I
don't know if it might take us beyond five o'clock
though.

THE COURT: All right. This might be an
appropriate time to adjourn.

Ladies and gentlemen of the jury, I again
admonish you and repeat what I've told you earlier,
except for the alternate jurors who were not here
at the time, not to discuss the case with anyone,
not to have anyone discuss the case with you; to
keep an open mind until you hear all the evidence,

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